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No. 716

In the

Supreme Court of the United States

OCTOBER TERM, 1963

JOHN L. LEWIS,

Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY, A CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR FRANKLIN COUNTY, OHIO

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INDEX

Opinions by Courts Below	1
Jurisdiction of the Court	2
Questions Presented for Review	3
Statutes Involved	4
Statement of the Case	6
Argument	14
A. Writ of Certiorari Should be granted	14
B. Questions 1 and 2	16
C. Question No. 3	18
D. Question No. 4	20
E. Question No. 5	21

Appendix

Appendix A—Decision of Court of Common Pleas	23
Appendix B—Opinion of Court of Appeals	29
Appendix C—Entry in the Court of Appeals	29
Appendix D—Notice of Appeal in the Supreme Court of Ohio	30

Authorities

Cuyahoga River Power Co. vs. Northern Realty Co. 244 U. S. 300, 37 S. Ct. 653	2
Keeseekers a minor, vs. The B. M. McKelvey Co., 141 Oh. St. 162, 169 (paragraph 3 of syllabus)	2

Texas and Pacific Railway Company vs. Rigsby, 241 U. S. 874, 876 ..... 14, 16
The Swetland Co. vs. Evatt, Tax Commissioner, 139 Oh. St. 6, 18 (paragraph 2 of syllabus) 2
United States vs. Thompson, 252 Fed. 2d 6 ..... 15, 17
Village of Brewster vs. Hill, 128 Oh. St. 343, 352, 353 2

Statutes

Const. of Ohio, Article IV, Section 2 2
Title 28, U.S.C., Section 1257 3
Title 45, U.S.C., Sections 1 and following 2, 4, 6
Title 45, U.S.C., Section 2 ..... 4, 5, 16, 25, 28
Title 45, U.S.C., Section 51 and following 2, 4, 6
Title 45, U.S.C., Section 53 ..... 3, 15, 19, 20
Title 45, U.S.C., Section 56 6

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OPINIONS BY COURTS BELOW.

Petition, John L. Lewis, respectfully prays that a writ of certiorari issue to the Court of Appeals for Franklin County, Ohio, to review the judgment of that court in Case No. 6995, entitled John L. Lewis vs. Pennsylvania Railroad Company, a corporation, which court by decision without opinion, dated March 26, 1963, (Appendix B), affirmed the judgment of the Court of Common Pleas for Franklin County, Ohio. The said Court of Common Pleas for Franklin County, Ohio, entered a judgment in favor of petitioner and against respondent in the amount of $5,000. Petitioner's motion for new trial was denied and the unreported decision of the same trial court on that motion, dated January 7, 1962, is appended to this petition (Appendix A).

JURISDICTION OF THE COURT

The entry of the judgment of the Court of Appeals for Franklin County, Ohio, of which review is sought, was dated April 16, 1963. (Appendix C).

Petitioner sought review of the judgment and decision of the Court of Appeals for Franklin County, Ohio, by motion filed in the Ohio Supreme Court for an order directing the Court of Appeals to certify its record to the Ohio Supreme Court. Review by the latter court was discretionary upon the ground that the case was one "of public or great general interest." Constitution of Ohio, Article IV, Section 2. This review was denied by the Ohio Supreme Court when it overruled petitioner's motion to certify its record by entry dated October 2, 1963. (Appendix D). That denial constituted a refusal by that court to exercise its discretionary power to review, and the denial did not constitute an affirmance of the judgment of Court of Appeals and was not a decision upon the merits. *Village of Brewster vs. Hill*, 128 Oh. St. 343, 352, 353; *The Scotland Co. vs. Evatt, Tax Commissioner*, 139 Oh. St. 6, 18 (paragraph 2 of syllabus); *Kreigsaker, a minor, vs. The B. M. McKelvey Co.*, 141 Oh. St. 162, 169 (paragraph 3 of syllabus).

Under the law of Ohio, therefore, when the Ohio Supreme Court denied motion to certify on October 2, 1963, the judgment of the Court of Appeals for Franklin County, Ohio, became the final judgment of the highest court of the State of Ohio in which a decision could be had. *Cuyahoga River Power Co. vs. Northern Realty Co.*, 244 U.S. 300, 37 S. Ct. 653.

This action arose and was tried under the provisions of the Federal Employers' Liability Act, Title 45, U.S.C., Sections 51 and following, and the Safety Appliances Act, Title 45, U.S.C., Sections 1 and following. Jurisdiction of this court to review the said judgment of the Court of Ap-

peals for Franklin County, Ohio, by writ of certiorari is, accordingly, conferred upon this court by the provisions of the Act of June 25, 1948, c. 646, 62 Stat. 929, Title 28, U.S.C., Section 1257. The portions of that section pertinent to jurisdiction in this review provide as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . . . . .
>
> "(3) By writ of certiorari . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . or statutes of the United States."

QUESTIONS PRESENTED FOR REVIEW

1. In this action arising under the Federal Employers' Liability Act and the Safety Appliances Act, did the trial court correctly leave for the jury's determination as an issue of fact whether or not Section 2 of the latter Act applied to the pertinent railroad cars in this case, or should the court have instructed the jury that said section applied as a matter of law, where all jurisdictional facts and evidence concerning the pertinent tracks, location, movement and intended use and destination of the said pertinent cars were undisputed?

2. Where such undisputed evidence showed that two of respondent's cars from a group of cars standing on a yard track were to be switched out of said track over intervening tracks and onto another track and there loaded onto flat cars for hauling out of state and ultimate destination, and where in the course of such movement, the petitioner was injured when caught between two cars standing on that track as he was manually unfastening chains between two of the cars which had no drawbars or couplers at that connection, was the trial court correct in submitting

the issue of whether Section 2 of the Safety Appliances Act applied to the two cars to be moved as a question of fact for the jury or should the trial court have instructed the jury that the Act applied to those two cars as a matter of law?

3. Where under the foregoing circumstances and evidence there was a conflict in the evidence as to whether cars A and B were to be removed from that track, as petitioner claimed, or cars B and C were to be removed, as respondent claimed, was the trial court correct in instructing the jury, in effect, that the liability of the respondent under Section 2 of the Safety Appliances Act would apply "if the petitioner was between the two correct cars" thereby predicating the applicability of the Act upon the conduct of or lack of negligence on the part of petitioner?

4. Was the trial court correct in refusing to instruct the jury, as requested by petitioner, in effect, that petitioner was not as a matter of law to be held negligent in the event that a violation of the Safety Appliances Act caused in whole or in part his injuries?

5. In view of the undisputed injuries and disability of petitioner and in view of the record herein, was the verdict of $5,000 rendered by the jury in favor of petitioner and against respondent a lawful one?

STATUTES INVOLVED

The statutes involved in this petition for review are certain sections of the Federal Employers' Liability Act, Title 45, U.S.C., Sections 51 and following, and Section 2 of the Safety Appliances Act, Title 45, U.S.C., Section 2. Section 1 of the Federal Employers' Liability Act, Title 45, U.S.C., Section 51, provides in its pertinent parts:

"Every common carrier by railroad while engaging in commerce between any of the States . . . shall be

liable in damages to any person suffering injury while he is employed by such carrier in such commerce, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Section 3 of that Act, Title 45, U.S.C., Section 53, is also involved and provides:

"In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: PROVIDED, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

The pertinent section of the Safety Appliances Act is Section 2, Title 45, U.S.C., Section 2, which provides:

"It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

Jurisdiction of the Federal claims arising under the foregoing Acts on the part of the state court is provided in

Section 6 of the Federal Employers' Liability Act, Title 45, U.S.C., Section 56, which provides as follows:

"No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

"Under this chapter an action may be brought in a district court of the United States in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several states."

STATEMENT OF THE CASE

This action was filed and tried in the Court of Common Pleas of Franklin County, Ohio, under the Federal Employers' Liability Act (Title 45, U.S.C., Sections 51, et seq.) and the Safety Appliances Act (Title 45, U.S.C., Sections 1, et seq.).

Petitioner was employed by respondent as a conductor in charge of respondent's railroad switching crew which had been engaged in switching activities in respondent's yard in Columbus, Ohio, from approximately 4:00 P.M. on the afternoon of November 28, 1958, until approximately 5:00 A.M. on the morning of the next day, November 29, 1958, at which time petitioner was injured. At the latter time the members of the crew were engaged in the final movement during their tour of duty, and the object of that movement was to take two of respondent's cars located on a track designated as Old Track #8 in respondent's 20th Street Shop Yard and to move the two cars from that track over intervening tracks and onto a track known as track #1. Old Track #8 extended essentially west and east, and the cars standing on that track were either to be repaired or destroyed (R. 151, 360). The track, however, was not

a repair track; and cars standing on that track were always moved from that track over intervening tracks either to respondent's shops for repair or onto tracks =1 and 2 for loading onto flat cars and transportation to Pennsylvania for destruction (R. 152, 361, 370, 371). The two cars which were to be moved and to be placed onto track =1 in the movement here in issue, were there to be loaded onto flat cars and transported to shops in Pennsylvania for destruction (R. 370, 371).

The foregoing evidence was undisputed.

There were a number of cars standing on Old Track =8. There was a conflict in the evidence and the claims of petitioner and respondent as to which two of the cars standing on track =8 were to be moved. This conflict centered upon three of the cars among the cut of standing cars. Those cars were from west to east: a hopper car, a second hopper car, and a stock car. There were cars both to the east and to the west of those three cars standing on Old Track =8. The conflict developed over the interpretation of the switch list which consisted of many sheets of paper listing the cars to be moved during the various switching movements during the tour of duty. That switching list was prepared by respondent's clerk and was in effect respondent's direction to petitioner as conductor to do the work listed thereon.

The conflict arose over the interpretation of that page relating to the movement in issue (Respondent's Ex. B1). Petitioner testified and claimed that the list indicated that the two cars which were to be taken were the two hopper cars since the designated cars had been marked "H," meaning hopper-type of car. Respondent's evidence and claim was to the effect that the two cars which were to be taken were the second hopper car and the stock car, basing that claim upon the numbers as shown on the switch list and certain photographs introduced into evidence. Under pe-

titioner's interpretation, he would and did in the course of the movement uncouple the second hopper car from the stock car. In order to accomplish this job, he did go between the east end of the second hopper car and the west end of the stock car, since those two cars were tied together by means of a chain due to the fact that the couplers and drawbars were missing at that juncture. Respondent claimed that petitioner should have gone to the east end of the stock car and uncoupled the east end of that car from the car immediately to the east where the coupling, according to respondent's evidence, was effected by means of the usual coupling.

When the final move for the tour of duty was commenced, respondent's crew was located on a track some distance from Old Track #8 with a locomotive, an attached caboose and flat car. Old Track #8 was open only at the west end. The final movement, therefore, required that the equipment be moved over the various intervening tracks and onto a lead track to a point west of the switch leading into Old Track #8. From there the equipment was to be moved eastward through the switch and onto Old Track #8. In order to facilitate the movement, petitioner walked across the intervening tracks to the point on Old Track #8 where he intended to uncouple the second hopper car from the stock car. In the meantime the locomotive and attached caboose and flat car were moved over intervening tracks and onto the lead track and then switched into the west end of Old Track #8. Petitioner went in between the east end of the second hopper car and the stock car and unfastened by hand the chain tying the two cars together. At that time, the locomotive with caboose and flat car attached to the east moved eastward on Old Track #8 and the flat car ran into and against the west end of the standing cars on Old Track #8. This movement was directed

and executed by the brakeman of respondent's crew; although the brakeman knew that petitioner had gone into Old Track =8 to uncouple between two of the cars. The impact caused the standing cars on Old Track =8 to move to the east and petitioner was caught and crushed between the east end of the second hopper car and the west end of the stock car.

Petitioner received severe crushing injuries which injuries were concealed and to which respondent's own doctor, that is, Dr. Ray Ebbert, testified (R. 33-58). Petitioner was taken to the hospital following his accident and was in medical shock. Petitioner suffered internal bleeding, fracture of the left clavicle, multiple fractured ribs, collapse of his lungs, fluid in his lungs, and damage to his heart, which led to a calcification of the pericardium or the sac around his heart. X-rays showed in addition fractures of the transverse processes of the second through the fourth lumbar vertebrae on the left and the second and third on the right. Petitioner was given blood transfusions. In addition for a time after the accident, petitioner was unable to maintain the ordinary urinary flow indicating damage to his kidneys. Petitioner had a paralytic ileus with resulting obstruction of the bowels. Petitioner remained in the hospital from the time he was taken to the hospital on November 29, 1958, until January 6, 1959, and continued under the care of the railroad's doctor until May 5, 1959. That doctor did not certify Mr. Lewis for return to work while Mr. Lewis was under his care.

Subsequently the petitioner was hospitalized and was seen, examined, tested and treated by a large variety of doctors. See testimony of petitioner (R. 211-222), Ray E. Ebbert (R. 33, et seq.), Dale E. Putnam (R. 71, et seq.), Chris B. Theodoton (R. 88, et seq.), William F. Bradley (R. 108, et seq.), Joseph A. Ridgeway (R. 161, et seq.),

Maurice G. Buckles (R. 260, et seq.), Joseph Ryan (R. 330, et seq.), Joseph F. Tomashefski (R. 372, et seq.) and John Q. Brown (R. 401, et seq.).

The evidence was uncontroverted that petitioner suffered total disability from the date of his injuries, November 29, 1958, until July 22, 1960. Loss of earnings for this period alone amounted to more than $10,000. From July 22, 1960, petitioner worked for respondent on various jobs, but had considerable difficulty and often had to miss work or leave work early. In June of 1961, petitioner was forced to quit work altogether due to his physical condition and has been unable to perform any railroad work since. Petitioner's medical evidence showed that he was and is permanently disabled from railroad work.

At the close of the evidence and prior to counsel's arguments to the jury, both respondent and petitioner submitted requests for special instructions to be given prior to argument in accordance with Ohio procedure. Petitioner's requested special instruction A was denied by the trial court. This instruction was to the effect that if the jury found that a violation of the Safety Appliances Act caused in whole or in part the injuries to petitioner, then the jury could not find that petitioner was himself negligent. The trial court granted respondent's request for special instructions 7 and 8 and did, over the objection of petitioner, give those instructions to the jury prior to arguments by counsel. Respondent's special instruction #7 was to the effect that "if you find from the facts that the Federal Safety Appliances Act has no application, then the issues are to be determined under the Federal Employers' Liability Act." The instruction then proceeded on the issue of negligence. Similarly, in special instruction #8 the jury was told "if you find under the facts that the Federal Safety Appliances Act does not apply, then Mr

Lewis must prove by a preponderance of the evidence that the defendant was guilty of negligence * * *."

In the arguments to the jury, counsel for respondent, over the objection of petitioner, was permitted to make an extensive argument on the issue of whether the cars were used in moving interstate traffic.

Then in the general charge to the jury following the arguments of counsel, the trial court in his general charge to the jury dwelt on the issues of negligence of respondent and contributory negligence of petitioner, giving hypothetical examples of how the verdict was to be reduced in accordance with the negligence of or percentage of negligence attributable to petitioner.

The court then charged on the Safety Appliances Act, and the following is the complete general charge of the court on that issue:

> "The fifth and last specification by Plaintiff is that Defendant used and permitted to be used on its line two cars with couplers that could not be uncoupled without the necessity of plaintiff going in between the two cars to uncouple or 'disconnect' them. And Defendant denies this. This specification rests on another federal law that
>
> > 'It shall be unlawful for any common carrier engaged in Inter-state Commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which cars can be uncoupled without the necessity of men going between the ends of the cars.'
>
> A violation of this law constitutes negligence per se. That is, it is an absolute duty, but as this act has been denied by Defendant, it is again for you, Ladies and Gentlemen of the Jury, to ascertain and determine the *fact*, remembering here again where the burden of proof and of proximate causation lies. If you find that the coupler was defective or inefficient under this law and was used by Defendant notwithstanding that fact, you will then inquire whether that defect or ineffici-

ency, if it be a fact, proximately caused the occurrence. This inquiry is very significant here because, if you find from the evidence that the couplers on the two cars which Plaintiff was attempting to unchain in order to complete the car movement in question were defective or inefficient, the question still remains whether under the facts and circumstances before you the defective or inefficient couplers proximately caused the occurrence within the import of the law I have just quoted to you and was shown to have done so by a preponderance of the evidence.

"If the couplers in question were defective or inefficient *under this law*, and proximately caused the occurrence, you may stop there because the Defendant would be liable. *If the Plaintiff was working on the two defective cars in the course of the execution of his switching duty then Defendant would be liable* and the only question remaining for you to determine would be the amount of compensation due him." (emphasis supplied)

Immediately following the foregoing instruction, the court again charged on the issue of the alleged contributory negligence of petitioner. The trial court at no time in his charge informed the jury, as previously requested by petitioner, that contributory negligence must be eliminated as a matter of law and damages found could not be reduced if the jury found that a violation of the Safety Appliance Act caused either in whole or in part the injuries to petitioner.

During its deliberation the jury submitted a written question to the court which the court answered as follows (R. 479):

"The Court: Here is a question from the jury: 'If both the Plaintiff and the Defendant are negligent, is the percentage value taken of the $250,000.00 or the value of a reasonable amount for the injuries, say $100,000.00', and that is signed, 'Gordon N. Royle, Foreman.'

"Now this answer will be sent to you: 'If you find both parties negligent, you shall subtract from the reasonable amount of damages which you feel Plaintiff has sustained the amount equal to the percentage of negligence attributable to Plaintiff.'

"Sater, J."

Counsel for petitioner objected to the foregoing answer and requested that the court in substance inform the jury that no percentage was to be deducted from the verdict if the jury found that a violation of the Safety Appliance Act caused in part the injuries to the petitioner. This request was refused. (R. 479, 480)

Subsequently the jury returned a verdict in favor of the petitioner for the amount of $5,000 to which verdict petitioner excepted. (R. 480)

Petitioner filed a motion for new trial and in that motion assigned as error, among others, the following acts or omissions of the trial court: the refusal to give petitioner's tendered special instruction A, giving respondent's special instructions 7 and 8, permitting respondent's counsel to argue to the jury relating to the applicability of the Safety Appliance Act, giving the foregoing instructions to the jury on the Safety Appliance Act, and submitting the foregoing answer to the jury's foregoing question during the latter's deliberation. Petitioner also assigned as error the claim that the verdict and judgment were contrary to law.

The same errors and claim were asserted by petitioner in the appeal to the Court of Appeals for Franklin County, Ohio, and in the motion to certify for review filed in the Ohio Supreme Court.

The trial court overruled petitioner's motion for new trial. Upon appeal the Court of Appeals for Franklin County, Ohio, affirmed the trial court without opinion. Thereafter the Ohio Supreme Court denied petitioner's motion to certify the record herein for review.

ARGUMENT

A. Writ of Certiorari should be granted.

Why should this busy Court grant certiorari to review the judgment and decision in this case where the trial court submitted the case to the jury under the Federal Employers' Liability Act and the Safety Appliances Act and the jury did return a verdict in favor of petitioner? The answer is that the verdict was unlawful and the judgment entered thereon was the result of errors which precluded lawful consideration of the Safety Appliances Act.

It cannot be seriously disputed that the amount of the verdict was grossly inadequate to compensate petitioner for the injuries and disability incurred, so inadequate in fact that the verdict was only slightly better than none at all. We assume for the purpose of this review that the jurors acted in accordance with their oath and decided this case on the evidence under the instructions of the court. From that assumption only one conclusion is possible of logical: the jury in this case drastically reduced the total amount of damages found to have been suffered by petitioner by assessing against petitioner a high degree of contributory negligence and reducing the total damages accordingly down to the verdict figure. This conclusion is substantiated by the terms of the question which the jury during its deliberation propounded to the court.

Yet, the errors and omissions of the trial court in this case combined to deprive petitioner of the benefits of the very provisions of law centering upon the issues of contributory negligence and absolute duty. The trial court first of all submitted to the jury as an issue of fact whether the provisions of that law, Section 2 of the Safety Appliances Act, applied to this case. This was in conflict with the holding of this Court in the case of *Texas and Pacific Railway Company vs. Rigsby*, 241 U.S. 874, 876, and was in

conflict in principle with the decision of the Circuit Court of Appeals in the case of *United States vs. Thompson*; 252 Fed. 2d 6. The trial court compounded and combined the foregoing error with the unlawful failure to inform the jury that contributory negligence was eliminated as a matter of law if the jury found that a violation of the Safety Appliances Act caused in whole or in part the petitioner's injuries, in which event there must be no reduction for contributory negligence. This failure was, of course, in direct conflict with the express terms of the statutory command, Title 45, U.S.C., Section 53. Lawful consideration of the Safety Appliances Act was further precluded by the court's confusion of the issue of whether the violation of the Safety Appliances Act contributed to cause the injuries with the issue of petitioner's contributory negligence. In the general charge to the jury the trial court informed the jury, in effect, that the former issue of cause must be resolved and depends upon the latter issue of petitioner's proper conduct, that is, whether he was working between the correct two cars or not. This was a serious confusion of issues and was a complete reversal of the correct law. The court should have correctly informed the jury that if the violation contributed to cause the petitioner's injuries, then the respondent was liable, and *contributory negligence was eliminated as a matter of law.*

In this case petitioner pleaded and presented two separate and distinct grounds of recovery, namely, negligence under the Federal Employers' Liability Act and violation of an absolute duty under the Safety Appliances Act. While the Acts are in *pari materia*, still it is extremely important that all the benefits of the Safety Appliances Act be preserved, even though both issues are submitted to the jury. This Court should accordingly grant certiorari, review the record and reverse the judgment and remand this

cause for a new trial in order that the issues of negligence and contributory negligence on the one hand and the violation of the absolute duty and elimination of contributory negligence on the other hand be clearly and distinctly separated and presented to the jury.

B. Questions 1 and 2

The pertinent section of the Safety Appliances Act, Title 45, U.S.C., Section 2, provides:

> "It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

The issue which the trial court should have determined as a matter of law was whether the two cars to be moved were "used in moving interstate traffic" and were thereby subject to the foregoing section. All jurisdictional evidence relating to this issue was undisputed. Old Track #8 upon which the cars were standing was not a repair track, but was used as a storage track for cars that were either to be repaired or destroyed. Respondent's crew, including petitioner, had commenced the movement, the object of which was to take two cars from Old Track #8 and to switch them over intervening tracks and onto track #1 where those two cars were to be loaded onto flat cars and transported to another state for destruction. The flat car which was attached to the locomotive and caboose and which was used in the movement, moreover, was one of the two flat cars upon which the two defective cars were to be loaded.

Under the holding of this Court in the case of *Texas & Pacific Railway Company vs. Rigsby*, 241 U.S. 874, the

trial court should have held and should have instructed the jury that the Safety Appliances Act applied to those two cars to be moved as a matter of law. In *Rigsby* the employee was injured while descending from the railroad's car because of a defect in one of the handholds or grabirons, and the injury occurred while this car which had been out of service and standing on a spur track for some days was being moved from that spur track to the railroad's shop for repair. In an action based upon the Safety Appliances Act and where, as here, the jurisdictional facts appeared without dispute, the trial court instructed the jury, as a matter of law, that they should return a verdict in favor of plaintiff, the only question submitted to them being the amount of the damages.

This Court upheld that decision as a matter of law and expressly rejected the railroad employer's argument that the statute did not apply since the car was not in use in transportation at the time and was being taken to the shop for repairs (241 U.S. 874, at page 876). See also *United States vs. Thompson*, 252 Fed. 2d 6.

By way of contrast the trial court here erroneously submitted to the jury the issue of the applicability of Section 2 of the Act as one of fact for the jury to decide. Such error commenced when the trial court gave respondent's tendered special instructions prior to argument of counsel; was continued when the trial court permitted counsel for respondent to argue as a matter of fact that the cars were not used in moving interstate traffic during the course of his argument to the jury; and was repeated and extended in the course of the subsequent general charge to the jury where after quoting Section 2 and informing the jury that a violation thereof was negligence per se, the trial court stated and informed the jury: "but as this Act has been denied by defendant, it is again for you, Ladies and Gentle-

men of the jury, to ascertain and determine the *fact*, remembering here again where the burden of proof and of proximate causation lies.

In short, an issue of law was erroneously submitted to the jury as an issue of fact for the jury's determination.

C. Question 3.

The trial court compounded the foregoing error by predicating the applicability of the Safety Appliances Act upon the proper conduct of the petitioner. Thus, the trial court charged:

> "If the couplers in question were defective or inefficient *under this law*, and proximately caused the occurrence, you may stop there because the Defendant would be liable. *If the Plaintiff, was working on the two cursed cars in the course of the execution of his switch sheet* then Defendant would be liable and the only questions remaining for you to determine would be the amount of compensation due him." (Emphasis supplied)

The foregoing was a catastrophic confusion of two separate and distinct issues or questions, namely: (1) did the violation of the Safety Appliances Act cause either in whole or in part the injuries to petitioner? and (2) was petitioner negligent, and if so, did such negligence contribute to cause his own injuries?

The foregoing instruction erroneously imposed a 'No' answer to question No. 2 as a prerequisite to a 'Yes' answer to question No. 1. In other words, a finding of proper conduct or non-negligence on the part of petitioner, was required as a condition precedent to a finding of causation under the Safety Appliances Act.

This was precisely the reverse of the correct law, namely, a finding that the violation of the absolute duty caused in part petitioner's injuries required as a matter of law a

finding of no contributory negligence on the part of petitioner. Title 45, U.S.C. Section 53.

The foregoing fundamental error was particularly disastrous in view of the evidence. Without dispute, proper execution of the switch list did require movement of two cars from Old Track No. 8. Petitioner contended that the two cars were hopper 1 and hopper 2 from west to east. Respondent contended that the two proper cars were hopper 2 and the stock car. Thus, the evidence was *uncontroverted* that *one* of the two cars to be moved in the *correct* execution of the switch list was hopper 2. The evidence is furthermore uncontroverted that hopper 2 was a defective car without a coupler or drawbar, and it was while petitioner was uncoupling this car that he was caught between the two cars. Thus, the jury could well have found, if properly instructed, that even though petitioner was not in between the two correct cars in accordance with the switch list, still a defect on the car to which the Act applied as a matter of law was at least in part the cause of his injuries.

Such a finding, it is true, was not compelled as a matter of law. The jury could have found that the sole and entire cause of the injuries to petitioner was his own conduct. The verdict for petitioner, however, conclusively shows that the jury did *not* so find; for such a finding could only have resulted in a verdict for respondent. Since the finding that petitioner's own conduct was the sole cause of his injuries must be eliminated from consideration because of the jury's verdict for petitioner, logic commands that on the undisputed evidence the defect in hopper car 2 was at least in part the cause of petitioner's injuries. The defect was *per se* a violation of the statute and at the same time was the direct cause of petitioner's position between the cars, without which the accident would not have occurred. Any

other finding, we submit, would be contrary to undisputed evidence and logic.

In any event the important point is: the foregoing instructions of the court precluded such a finding and deprived petitioner of the lawful consideration by the jury of the Safety Appliances Act.

D. Question No. 4

Allied and contigned with the foregoing affirmative error of the court was the trial court's refusal to instruct the jury that if a violation of the Safety Appliances Act caused in part the petitioner's injuries, petitioner cannot be held to have been negligent. This failure, as we have pointed out, was in violation of the express terms of the controlling statute: Title 45, U.S.C., Section 53.

Request for such an instruction was made by petitioner through tendered special instruction A prior to arguments of counsel. This the trial court refused.

Then after the arguments and general charge and during the deliberation, the jury submitted a written question which the court answered as follows:

> "The Court: Here is a question from the jury: 'If both the Plaintiff and the Defendant are negligent, is the percentage value taken of the $250,000.00 or the value of a reasonable amount for the injuries, say $100,000.00' and that is signed, 'Gordon N. Royle, Foreman.'
>
> "Now this answer will be sent in: 'If you find both parties negligent, you shall substract from the reasonable amount of damages which you feel Plaintiff has sustained the amount equal to the percentage of negligence attributable to Plaintiff.' 'Sater, J.'"

Here again the petitioner requested the court to inform the jury that it could not find contributory negligence on the part of petitioner and could not reduce the damages if it found the violation of the Safety Appliances Act caused

in part the petitioner's injuries. The trial court refused to so inform the jury.

In short, at no stage of this proceeding was the jury clearly informed that if a violation of the Safety Appliances Act caused in part injuries to petitioner, there could be no finding of contributory negligence on the part of petitioner and there could be no reduction of any damages found.

The token verdict returned by the jury is dramatic demonstration of the disastrous effect of the foregoing error.

E. Question No. 5

The verdict and judgment of $5,000 entered in this case are unlawful. We wish to be candid and clear. Under proper instructions a verdict in favor of the respondent railroad on the evidence in this case could have been lawfully rendered. A verdict in favor of petitioner in the amount found, however, could not be and was not lawful.

We must assume, as we stated at the outset of our argument, that the members of the jury returned their general verdict in accordance with their oath to decide this case on the evidence and under the instructions of the court. A verdict of $5,000 could not have been rendered in accordance with such an oath unless the damages had been drastically reduced on the grounds of petitioner's contributory negligence. No fair-minded man or woman in hearing the evidence or reviewing this record could find that such a pittance was adequate or fair reimbursement to petitioner for his uncontroverted injuries and uncontroverted past disability, without even a consideration of the future disabilities and losses.

This case was pleaded, tried and submitted to the jury on negligence and the violation of respondent's absolute duty under the Safety Appliances Act. Fundamental errors of the court, however, combined to preclude any lawful

consideration by the jury of the Safety Appliances Act. And it was from that Act that petitioner should have derived as a matter of law protection against the defence of alleged contributory negligence, which issue was the most vigorously contested in the law suit.

The court affirmatively blocked proper jury consideration of that Act by leaving the applicability as a matter of fact for the jury when it should have charged that the Act applied as a matter of law. Then the court set forth as a prerequisite to the liability of the respondent under that Act a finding of proper conduct or lack of negligence on the part of petitioner. Conversely the court failed to inform the jury that a violation of that Act if found to have contributed to cause petitioner's injuries produced the result as a matter of law that any contributory negligence of petitioner was eliminated and damages must not be reduced.

The combined effect of these fundamental errors was not only to preclude lawful consideration by the jury of the applicability of the Act, but also to rule out the lawful result if the Act was found to apply.

The result was a verdict which on the evidence and under the instructions of the court was both inadequate and unlawful. This court should grant certiorari, review this record, reverse this unlawful judgment and remand for a new trial. This action should be taken not only for the sake of according petitioner a lawful trial, but also for the purpose of assuring that the benefits of both the Federal Employers' Liability Act and the Safety Acts will be preserved where the two are combined in one action.

Respectfully submitted,

C. Richard Grieser,
8 East Broad St., Columbus 15, Ohio,
Attorney for Petitioner.

APPENDIX A

COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

DECISION

Rendered this 7th day of January, 1962.

SAFER, J.

This cause is now before the Court for ruling on plaintiff's motion to vacate the judgment entered for plaintiff upon the verdict returned by the jury in favor of the plaintiff, and to grant plaintiff a new trial; the judgment entry bears the signed approval of counsel for both parties. The motion contains twelve branches or assertions of alleged error.

The sixth assertion of error is "Misconduct of counsel for defendant"; the seventh is "Misconduct of the jury". These two assertions received more attention than the other ten combined. They will consequently be first considered and ruled on at this time, but to fully and properly understand them with the Court's present ruling on them, the full setting must be considered.

This case was heard in our court room No. 8 which is smaller and differently laid out than any of our other seven trial court rooms. In this court room, the bench is against the south wall of the court room, somewhat west of the center of the room. The jury box is about eight moderate paces north of the bench and facing it; behind the jury box is a five foot aisleway terminating in the north wall of the room. To the right of the bench is a table long enough to seat three persons; this table is closer to the jury box than to the bench because the witness stand is placed between the table and the bench. To the left of the bench, on the west side of the room, is another table of equal size and

it, too, is closer to the box than to the bench, not only because the flag and standard are between the table and the bench, but also because the chair and desk for the court reporter are just to the left or west of the center of the bench with the result that placement of this table any farther to the south materially hinders if it does not actually block observation of a witness on the stand by some or all of those seated at this west table. When people are seated at this table, there is barely room for others to pass behind their chairs. The door to the jury room is in the south wall, close to the left, or west, of the bench. The outside corridor door is in the northeast corner of the room with the result that most people entering the room to go to the jury room, pass behind the jury box and then behind those seated at the west table and on into the jury room about five feet from the end of the table; direct passage diagonally across the center of the room to the jury room is hindered by the east end of the jury box, its close proximity to the east table, the reporter's desk and chair, the flag standard, the south end of the west table and the west end of the bench. During the trial plaintiff and his two counsel were seated at the east table, the two counsel for the defendant and one of its employees at the west table.

The trial of this case began on Monday morning and adjourned from day to day. (It was the end of the trial portion of the September term and it was the last case for this particular jury). The petition alleged violation of the F.E.L.A. and of the Federal Safety Appliance Act (U.S.C.A., Title 45, sec. 2). Following closing arguments, the Court's charge ended so late in the afternoon of Thursday that with consent of counsel, the jury retired just long enough to elect a foreman. On their return to the box the usual admonition and instructions how and when to re-receive all exhibits and verdict forms were given them and

court recessed for the day, but before the jury left the box, the Court informed them that on the following day one of defendant's counsel would be out of town all day and that for a part of the morning anyway, the other would understandably desire to attend his son's graduation from the law school of Ohio State University.

On the following, Friday morning, several jurors arrived before the Court did and went to the jury room to await the arrival of their colleagues. Then Mr. Royle, the foreman of the jury, entered the court room, passed back of the jury box where he "passed howdy" with one of plaintiff's counsel and they continued west and south behind the table that had been used by defendant's counsel. At this table were seated Mr. Barton, who had conducted a large part of defendant's case, and a young man from his office who would carry on while the jury deliberated. Before them on the table was an unopened small brief case. As it later turned out from testimony of the foreman, called by plaintiff's counsel who had been, as noted above, standing behind the jury box about 8-9 ordinary paces away from Mr. Barton, the foreman, in passing, asked Mr. Barton if that was the son who was graduating that morning. The answer was in the negative, that it was a young man called on from the same office to replace participant counsel, one of whom was already gone, and the other was soon to be on his way to that graduation. Happiness was expressed over this graduation because it was from the same alma mater school from which had graduated not only Mr. Barton, but also "his illustrious father-in-law" and the son's grandfather, Judge John R. King, late of this bench — and let it be noted that this matter of "illustrious father-in-law" first entered this case in so many words in now-protesting counsel for plaintiff's reply argument which continued on

into a personal attack on defendant's counsel which not only had nothing to do with the case but also in the humble opinion of this writer, could serve no purpose but to alienate the jury. Thus, now, protesting counsel thrice misjudged his jury.

A 3-4 minute colloquy followed which admittedly (by now protesting counsel for plaintiff) had nothing to do with the case, in which the foreman stated he had graduated from the engineering school at Ohio State University but had sent his son to Purdue. After that the foreman passed on into the jury room and Mr. Barton departed the room for reasons already stated.

Just a few moments later the writer arrived. At this point let it be here noted that now-protesting counsel had been so close, not over 8-9 ordinary paces, to Barton and the foreman that from what follows he could and did overhear so much of the conversation between Barton and the foreman that he states in his brief (page 2) in support of the present motion that "It is true they did not discuss the case". And how the foreman of any possible stretch of the imagination" knew that the young man with Barton at the table) could not have been his son, who was graduating" is utterly beyond the comprehension of the Court and is completely without support in the record; yet it is now put forth on the same page 2 of the same brief noted just above.

Furthermore, at no time after the arrival of the Court did either counsel for plaintiff call the matter of this conversation to the Court. Nor did such counsel read any exception into the record. Nor did they move for a mistrial. As a matter of fact: now-protesting counsel left the court room soon after the jury were locked up for their delibe

ations and his next appearance therein was nine days later when this present motion was heard. If there was any bitterness over the merits of this case, the Court observed no signs of it at defendant's table.

The jury returned its verdict, entry of judgment was promptly signed, and this motion was filed and heard. Counsel for plaintiff, at that hearing, called the foreman as a witness; no misconduct, obviously, was involved. The foreman testified as stated above. No other witness was called, oral argument was had and excellent briefs were filed. The foregoing leaves the entire matter to the discretion of the Court. The decisions are clear that in this sort of situation each case stands on its own facts.

In most jurisdictions, including Ohio and most of the authorities cited by plaintiff, where a party or his counsel has knowledge of the act or occurrence complained of, the failure to bring it to the attention of the Court or to request remedial action until after the rendition of the verdict, operates ordinarily as a waiver thereof as a ground for a new trial. So it is here. The sanctity of jury functions and deliberations must unquestionably be maintained, but for this Court to hold here that the record facts cast serious suspicion upon the verdict, would be simply opening the door for setting aside verdicts because of some whimsy or fanciful notion conceived after an adverse verdict. Here the verdict was adverse only in the sense that it was not as much as plaintiff wanted. It would belittle the acumen of jurors to hold that this casual conversation, especially when now protesting counsel as shown by his questions to the foreman while on the witness stand, could hear so much of the conversation as to know and concede that the case was not discussed, created a bias or sympathy

for defendant that was reflected in the verdict. The 23rd Canon of Legal Ethics does not impose boorishness on counsel; nor is it required of jurors.

In considering the remaining ten assertions of error, we make only brief comment. (1) We find no error in either the charge to the jury or in the giving or rejection of special charges. (2) The inadequacy of the verdict is a pure assumption by plaintiff. What hangs over plaintiff's case like a shroud is the fact that when he was injured, he was in a place which his work sheet showed he had no business to be. (3) Plaintiff's entire case overlooks the matter of proximate causation. There was little evidence of an unsafe place to work; there was none with regard to the couplers; it is as though a "brakie" slipped from an icy grab iron after a coupler broke 98 cars to the rear or front. (4) Lacking as it does the element of causation, plaintiff's interpretation of the Safety Appliance Act (45 U.S.C.A. sec. 2) would make it impossible for a railroad to move a car with a broken coupler even if the car lay on its side across the track or across three tracks. (5) When the jury sends in a written question for the Court to answer, it is the duty of the Court to answer the question if it is germane to the case and not to writ a dissertation on the law of carriers or to speculate upon which, if any, of two branches of a case the jury may be deliberating.

The motion for new trial is denied.

KENNETH A. SAYER, *Judge*.

APPEARANCES:

DOOLEY, TYLER, RICHARDS AND GRIESER,
Attorneys For Plaintiff.

BRICKER, EVATT, BARTON, FICKLER AND NIEHOFF,
Attorneys For Defendant

APPENDIX B

In the Court of Appeals of Franklin County, Ohio

OPINION

[Rendered on March 26, 1963]

PER CURIAM.

Upon examination of the record we find no error prejudicial to the appellant. Judgment affirmed without written opinion.

Duffey, P. J., McLaughlin and Richardson, JJ., of the Fifth Appellate District, sitting by designation, concur.

APPENDIX C

In the Court of Appeals of Franklin County, Ohio

JOHN T. LEWIS,

Plaintiff-Appellant,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,

Defendant-Appellee.

No. 6995

[Filed April 15, 1963]

ENTRY

This appeal came on for hearing on the assignments of error, the original papers and transcript from the Court of Common Pleas of Franklin County, Ohio, and on consideration of the briefs and argument of counsel. The Court finds there is no error prejudicial to appellant apparent on the record in the proceedings and judgment by the court below; and that substantial justice has been done but there was a reasonable cause for the appeal.

It is, therefore, considered and adjudged that the judgment of the court below be and it is hereby affirmed, without penalty.

It is further ordered and adjudged that appellant pay the costs of this proceeding.

APPENDIX D

Proceedings in the Supreme Court of Ohio

JOHN L. LEWIS,

Plaintiff-Appellant,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
a corporation,

Defendant-Appellee.

[Appeal from Franklin County Court of Appeals

No. 6995]

NOTICE OF APPEAL

[Filed May 4, 1963]

John L. Lewis, plaintiff-appellant in case No. 6995 in the Court of Appeals for Franklin County, Ohio, hereby files in this Court his notice of appeal to the Supreme Court of Ohio from the entry of judgment rendered by the Court of Appeals for Franklin County, Ohio in case No. 6995 and journalized on the 16th day of April, 1963 which judgment affirmed the judgment of the Court of Common Pleas for Franklin County, Ohio rendered in favor of plaintiff-appellant and against defendant-appellee, and the order of said Common Pleas Court overruling plaintiff-appellant's motion for new trial.

The parties in said appeal in case No. 6995 in the Court of Appeals for Franklin County, Ohio were John L. Lewis, plaintiff-appellant and the Pennsylvania Railroad Company, a corporation, defendant-appellee. This appeal is on questions of law and is taken on condition that a motion to certify record be allowed by the Supreme Court of Ohio.

DOMBEY, TYLER, RICHARDS AND GRIESER
Eight East Broad Street, Columbus, Ohio
Attorneys for Plaintiff-Appellant

Proof of Service

The undersigned, attorneys for the Pennsylvania Railroad Company, a corporation, defendant-appellee, hereby acknowledges receipt of a copy of the foregoing Notice of Appeal on this ____ day of May, 1963.

BRICKER, EVATT, BARTON, ECKLER AND NIEHOFF
50 West Broad Street, Columbus 15, Ohio
Attorneys for Defendant-Appellee

IN THE SUPREME COURT OF OHIO

JOHN L. LEWIS,
Plaintiff-Appellant,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
a corporation,
Defendant-Appellee.

Appeal from Franklin County Court of Appeals

No. 6995

MOTION TO CERTIFY RECORD

Plaintiff-appellant, John L. Lewis, hereby moves this Court for an order directing the Court of Appeals of Franklin County, Ohio, to certify for review by this Court the record in Case No. 6995 in said Court of Appeals.

Plaintiff-appellant, John L. Lewis, was the appellant in the appeal in said Court of Appeals, and defendant appellee, The Pennsylvania Railroad Company, was appellee in said Court of Appeals.

The grounds for this motion are that the issues and questions involved in this case are of public and of great general interest and that errors prejudicial to plaintiff appellant intervened and were committed in this case in the Court of Common Pleas for Franklin County, Ohio, and in the Court of Appeals for Franklin County, Ohio, whereby the said Court of Appeals affirmed the judgment of the said Common Pleas Court rendered in favor of plaintiff-appellant and against defendant-appellee, and affirmed the order of said Court of Common Pleas, overruling plaintiff appellant's Motion for New Trial.

Plaintiff-appellant filed his Notice of Appeal in the said Court of Appeals in Case No. 6995 and in this Court on May 4, 1963.

The aforesaid grounds for this Motion will be set forth and supported in plaintiff-appellant's assignment of errors and brief in support of this Motion.

Respectfully submitted,

DARBY, TYLER, RICHMOND AND GREEN
Eight East Broad Street, Columbus, Ohio
Attorneys for Plaintiff-Appellant.

Proof of Service

The undersigned, attorneys for the defendant-appellee, The Pennsylvania Railroad Company, hereby acknowledge receipt of a copy of the foregoing Motion to Certify Record on this 14th day of May, 1963.

BRICKER, EVATT, BARTON, ECKLER AND NEUHOFF,
50 West Broad Street, Columbus 15, Ohio,
Attorneys for Defendant-Appellee.

IN THE SUPREME COURT OF OHIO

(Appeal from the Court of Appeals of Franklin County, Ohio, Case No. 6995)

JOHN L. LEWIS,

Plaintiff-Appellant,

vs.

PENNSYLVANIA RAILROAD COMPANY,

Defendant-Appellee.

ASSIGNMENT OF ERRORS AND BRIEF OF PLAINTIFF-APPELLANT

ASSIGNMENT OF ERRORS OF PLAINTIFF-APPELLANT, JOHN L. LEWIS

Plaintiff-appellant, John L. Lewis, hereby makes and files his assignment of errors in this Court, each of which was prejudicial to his interests and rights in the proceedings herein in the Court of Common Pleas and in the Court of Appeals of Franklin County, Ohio.

1. The Court of Common Pleas erred in giving defendant's requested special instruction No. 7 to the jury prior to the arguments to the jury over the objections of plaintiff.

2. The Court of Common Pleas erred in giving defendant's requested special instruction No. 8 to the jury prior to the arguments to the jury over the objections of plaintiff.

3. The Court of Common Pleas erred in permitting defendant's counsel to make certain arguments to the jury relating to the Safety Appliance Act which arguments erroneously designated the application of that Act as a question of fact for the jury's determination, and the Court

of Common Pleas erred in failing to instruct the jury at the time that said arguments were made that the cars involved in this action which were to be moved from Old Track No. 8 to Track No. 1 were as a matter of law subject to that Act.

4. The Court of Common Pleas erred in its general instruction to the jury relating to the Safety Appliances Act in that portion which submitted to the jury for its determination as a matter of fact that issue as to whether the said Act applied to the said two cars to be moved from Old Track No. 8 to Track No. 1.

5. The Court of Common Pleas erred in refusing to give to the jury prior to arguments plaintiff's tendered special instruction "A" relating to the issue of contributory negligence and the safety Appliances Act.

6. The Court of Common Pleas erred in its general instructions to the jury in that portion whereby the Court instructed the jury, in effect that the applicability of the Safety Appliances Act depended upon proper or correct conduct on the part of plaintiff.

7. The Court of Common Pleas erred in the written answer made by the Court in response to the written question submitted by the jury during its deliberation, to which answer of the Court the plaintiff excepted; and the said Court erred in refusing to answer said question as requested by plaintiff as said time.

8. The amount of damages found by the jury in its verdict are grossly inadequate.

9. The verdict of the jury and the judgment entered thereon are not sustained by the evidence and are against the manifest weight of the evidence.

10. The verdict and judgment are contrary to law.

11. The Court of Common Pleas erred in refusing to grant a new trial on the ground of admitted misconduct of counsel for defendant.

12. The Court of Common Pleas erred in refusing to grant to plaintiff a new trial on the ground of misconduct of one of the jurors herein.

13. The Court of Appeals for Franklin County, Ohio, erred in overruling each of the aforesaid assigned errors.

14. The Court of Appeals erred in affirming the judgment of The Court of Common Pleas herein and in affirming the order of said Common Pleas Court overruling plaintiff appellant's motion for new trial.

Respectfully submitted,

DOMBEY, LYLE, RICHARDS & GUESER

Eight East Broad Street

Columbus 15, Ohio

Attorneys for Plaintiff Appellant

IN THE SUPREME COURT OF OHIO

No. 38233

(Appeal from the Court of Appeals of Franklin County, Ohio, Case No. 6995)

JOHN L. LEWIS,

Plaintiff Appellant,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,

Defendant Appellee.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR FRANKLIN COUNTY TO CERTIFY ITS RECORD

Filed October 2, 1963.

It is ordered by the Court that this motion is overruled.